

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (Eastern Division)

Comcast of Southern New England, Inc.

Case No.: **03-12265-GAO**

(“Comcast”)

Plaintiff,

VS.

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT**

Erica Coleman

Defendant

1. Effect of Default

The Plaintiff filed a Complaint in this action on November 14, 2003. The Defendant appeared by filing an answer. The Defendant also appeared at a scheduling conference. However, thereafter the Defendant failed to continue to defend herself in this action. She did not attend a status conference and she did not respond to any discovery. This Court defaulted the defendant on March 07, 2005.

The Default already entered in this action against the Defendant is similar to a finding of liability against the Defendant. See, *Almedia v. Secretary of Health Education of Welfare*, 622 F.2d 1044 (1st Circuit 1980). Accordingly, based upon the Default that has already entered against the Defendant, the Plaintiff has now proven the liability of the Defendant as to the matters set forth in the Plaintiff's pleadings.

2. Analogous Case Law

The Plaintiff has moved forward for Default pursuant to 47 U.S.C. § 553, a provision of Title 47 that prohibits the unauthorized interception of television signals from the cable television system. The telecommunications provisions of the United States Code also contain the provision, 47 U.S.C. § 605, which prohibits the unauthorized utilization of interstate radio-originated communications. Section 605 is extremely similar to 47 U.S.C. § 553.

Both provisions essentially bar the unauthorized interception of television signals. Also, the statutory damage provisions for non-commercial defendants in § 605 and § 553 are extremely similar. In fact, the Second Circuit has held that where there is an unauthorized interception of signals from a coaxial cable, and the signals intercepted from the cable include interstate radio-originated communications, both §605 and §553 are violated. See *International Cablevision, Inc. v. Sykes* ("Sykes I"), 997 F. 2d 998, 1007 (2d Cir. 1993); *International Cablevision, Inc. v. Sykes* ("Sykes II"), 75 F.3d 123, 131 n.4 (2d Cir. 1996); but see *Charter v. Cintron* (and related Cases) 04-40064 FDS (D. Mass 2005) (a copy of the unpublished case is attached here as Exhibit A). In any event, even if § 605 might not apply for unauthorized cable television violations in the District of New Hampshire the cases decided pursuant to 47 U.S.C. § 605 are, at least, analogous or similar to §553 cases. Accordingly, the Plaintiff will make citations to § 605 cases simply as persuasive authority.

Also, in some of the cases cited in this Memorandum the defendants were using black market non-addressable descrambling devices to covertly descramble all of the cable company's signals. These descrambling devices are often referred to as "black boxes". In the case at bar one of the Plaintiff's legitimate converter/descramblers has been covertly modified by the Defendant or his agent to create a non-addressable descrambling device, in essence a home made black box. This descrambling device was then utilized for the unauthorized interception of the Plaintiff's signals. Therefore these "black box cases" are analogous to the claims in this Civil Action. Additionally, the Plaintiff cites to satellite television cases in this Memorandum wherein

the defendants utilize satellite de-scrambling devices that are also similarly analogous to the homemade black box utilized by the Defendant in this Civil Action.

3. The Plaintiff's Case without the Default

Even without the Defendant's Default, the Plaintiff still has a strong case against the Defendant. Possession of a television descrambling device is sufficient evidence from which a trier of fact could infer that the device was used to descramble the Plaintiffs television signals. The decision in the Florida District Court case of *DirecTV. v. Miller*, Case no 6:03-cv-1027-Orl-19KRS (a copy of the unpublished case is attached hereto as "Exhibit B") supports this proposition. In the Miller case, the plaintiff, DIRECTV, had evidence that the defendant possessed a satellite television descrambling device called an "unlooper". The defendant in the *Miller* case moved for Summary Judgment against DIRECTV contending that DIRECTV lacked the necessary "direct evidence" such as eyewitness testimony or videotape of some wrongdoing. The Court rejected this argument stating:

A reasonable jury could conclude that the defendant illegally stole DirecTV's programming. Based on their life experience, a jury could reasonably assume that people only buy electronic equipment such as televisions, computers, or (in the case of Defendant) satellite piracy unloopers when they plan to use such equipment. It would be a strange world, after all, if people regularly bought such equipment and then put it in the closet to collect dust. *Id* at 7

Moreover, the Defendant's actual possession of a television descrambling device leads to the reasonable inference that the device was used to descramble. In *Community Television Systems, Inc. v. Caruso*, 134 F. Supp. 2d 455 (D. Conn. 2000), *aff'd*, 224 F.2d 430 (2d Cir. 2002), there was evidence that the defendants purchased and installed cable television de-scramblers that would allow them to illegally view the plaintiff's cable television programming. *Id.* at 456. Although there was no so-called "direct" evidence that the defendants had ever actually used the devices the court, nonetheless, found the defendants liable for using the devices. After noting that the defendants had engaged in the transactions of obtaining

descrambling devices from a distributor named “Radil” the court said:

Based on the record here, the most reasonable inference is that each such transaction was engaged in with Radil so the descrambler could be used for its intended purpose, namely to receive cable services over TCI’s system; there is no evidence of non-use or any other use. Thus, the court concludes that each of the named defendants used and benefited financially from the descrambler sold by Radil, commencing in 1992 *Id.* at 460.

The Second Circuit affirmed the pertinent elements of the Connecticut District Court’s liability decision in the *Caruso* case. In fact, the Second Circuit stated that the purchase and installation evidence was “*at least*” enough evidence for a rebuttable presumption of use.

The court said:

“In the pending case, the seller’s computer records showed the names of [the defendants] and the devices were installed in their home. That evidence suffices to create *at least* a rebuttable presumption that each of them is liable.” *Community Television Systems, Inc. v. Caruso*, 284 F.3d 430, at 432 (2nd Cir. 2002) (emphasis added).

4. Well Pled Facts Deemed Proven Upon Default

The Default already entered in this action against the Defendant is similar to a finding of liability against the Defendant. See, *Almedia v. Secretary of Health Education of Welfare*, 622 F.2d 1044 (1st Circuit 1980). Accordingly, based upon the Default that has already entered against the Defendant, the Plaintiff has now proven the liability of the Defendant as to the matters set forth in the Plaintiff’s pleadings.

Accordingly, the Plaintiff has proven certain pertinent facts, including but not limited to the facts that:

- a. The Plaintiff has the legal franchise to sell cable television services in the Defendant’s area;

- b. The Plaintiff distributes its cable television services to its subscribers utilizing scrambling technology such that a subscriber will receive descrambled (clear view) signals only for those services the subscriber is authorized to receive;
- c. On or before December 28, 2000 the Defendant or some third party, covertly modified a certain Plaintiff issued decoder and thereby created an illegal, unauthorized descrambling device;
- d. From on or before December 28, 2000, the Defendant utilized an unauthorized descrambling device to receive and/or intercepted the Plaintiff's premium cable channels and pay per view events without authorization and without payment to the Plaintiff; and
- e. The Defendant's unauthorized interception of signal was done knowingly and willfully.

Based upon these facts and others set forth in the Plaintiff's pleadings, the Defendant is now liable to the Plaintiff for willful violations of Title 47 U.S.C. § 553(a). Specifically, the Defendant's actions violated §553(a)(1), which provides:

No person shall intercept or receive or assist in intercepting or receiving any communications services offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

II. Damages

1. Damage Provisions and Remedy Provisions in Title 47 U.S.C. § 553(c)

Title 47 U.S.C. §553(c) provides civil damages and remedies to an aggrieved party from a Defendant who has violated the above referenced §553(a) (1). Various subsections of § 553 (c) provide:

1. The Court may grant a final injunction to prevent further violations of §553 (a)(1) pursuant to 47 U.S.C. § 553 (c)(2)(A);
2. The Court may grant recovery of full costs including awarding reasonable attorney's fees to the aggrieved party who prevails pursuant to 47 U.S.C. 553(c)(2)(C); and
3. The Court may award actual damages or the Court may, at the Plaintiff's election, award statutory damages in a sum of not less than \$250.00 or more than \$10,000.00 as the court considers just, pursuant 47 U.S.C. § 553(c)(3)(A)(ii).
4. The court can increase the statutory damage award by up to \$50,000.00 if the violations of §553 (a) were willful and private financial gain pursuant to 47 U.S.C. § 553(c)(3)(B).

2. The Assessment of Statutory Damages

Although 47 U.S.C. §553(c) provides little guidance on the assessment of statutory damages, courts have used a variety of methods when assessing statutory damages including:

(a) Estimating actual damages, See *Comcast v Naranjo* 303 F. Supp. 2d 43 (D. Mass 2004) *Charter v Cintron* (and related Cases) 04-40064 FDS (D. Mass 2005) and *Cablevision v Lokshin*, 980 F. Supp. 107 (E.D.N.Y. 1997);

(b) Assessing additional damages, over and above an estimate of actual damages, pursuant to the exemplary damages provision of the statute, 47 U.S.C. § 553(c)(3)(B), based upon the willfulness and private financial gain of the defendant. See *Charter v*

Cintron (and related Cases) 04-40064 FDS (D. Mass 2005) and *Cablevision v Lokshin*, 980 F. Supp. 107 (E.D.N.Y. 1997);

(c) **Assessing additional damages as a form of deterrence**, See *Time Warner v Domskey*, No. 96 Civ. 6851, 1997 U.S. Dist. LEXIS 13505 (S.D.N.Y. Sept. 2, 1997) (a copy of the unpublished decision is attached here to as “Exhibit C”), *DIRECTV v Getchel* 2004 WL 1202717 (D. Conn. 2004) (a copy of the unpublished decision is attached here to as “Exhibit D”) and *Cablevision v Collins* 2004 WL 1490307 (S.D.N.Y. 2004) (a copy of the unpublished decision is attached here to as “Exhibit E”).

3. The Estimate of Actual Damages

A. Estimate of Actual Damages per month utilizing *reasonable inferences of use*.

By an Affidavit of Comcast’s employee, Paul Marmelo, he has asserted for Comcast that:

- a. A particular converter/descrambler, bearing serial number JE53ABNQD, was issued by a predecessor in interest of Comcast to the Defendant on August 31, 1999.
- b. Converter/descrambler JE53ABNQD was returned to a predecessor in interest of Comcast by the Defendant on December 28, 2000.
- c. Shortly after Converter/descrambler JE53ABNQD (hereinafter the “device”) was returned to the Plaintiff, I tested the device. The test evidenced the fact that this device had been electronically modified while in the possession of the Defendant so as to allow for the unauthorized reception of secured cable system programming including premium and pay per view channels.

- d. This Defendant's account history reveals that the Defendant that only purchased standard, non-premium service while in possession of the device and did not order premium channels or pay-per-view offerings well in possession of the device.
- e. Based upon these facts, and absent other evidence, it is reasonable to infer that the device was modified after it went into the home in August 1999 and was utilized to obtain unauthorized interception of premium channels and pay per view events until the device was returned to the Plaintiff in December 2000.
- f. Accordingly, absent any other information, it can be inferred that the duration of the unauthorized interception was approximately 15 months.
- g. An individual in possession of a descrambling device would still need to purchase some cable television signals from the Plaintiff in order to allow signals to enter the home and thereafter be descrambled.
- h. Additionally, the non-premium cable television stations (e.g. MTV, The History Channel, etc.) are offered to subscribers in groupings of channels ("tiers"). These channels are either delivered in groups to the subscriber in a non-scrambled fashion or they are simply not delivered into the home at all. This also explains why an individual with a descrambling device might still be paying a significant amount to the cable television company while utilizing a descrambler to descramble the premium channels. If an individual wanted access to all stations that individual would have to pay to have the non-scrambled stations come into the home and then use the descrambling device to scramble the premiums stations and pay-per-view offerings.

- i. During the above referenced 15 month period the pricing for standard service (“tiers”) varied significantly but taking into account the length of time and the variations in price it is reasonable to state that Defendant was paying *on average* \$35.00 per month for his service from the Plaintiff. This service did not include any scrambled premium stations.
- j. During the above referenced 15 month period the charge for all of the premium channels that would have been available to the Defendant through the use of the device varied significantly but taking into account the length of time and the variations in price it is reasonable to state that price *on average* was \$65.00 per month. This \$65.00 figure represents the value of the premium channels the Defendant had access to over and above the non premium stations she was actually paying for.
- k. During the above referenced 15 month period the charge for and the number of pay per view movie offerings that were accessible to the Defendant through the use of the device varied significantly but taking into account the length of time and the variations in price it is reasonable to state that price *on average* was \$3.95 per movie and there were numerous movies offered per month.
- l. During the above referenced 15 month period the charge for and the number of adult pay per view movie offerings that were accessible to the Defendant through the use of the device varied significantly but taking into account the length of time and the variations in price it is reasonable to state that price *on average* was \$8.95 per movie and there were numerous movies offered per month.

- m. During the above referenced 15 month period the charge for and the number of special event pay per view offerings (e.g.; boxing or wrestling match) that were accessible to the Defendant through the use of the device varied significantly but taking into account the length of time and the variations in price it is reasonable to state that price *on average* was \$30.00 per special event slightly and, on average there was at least one special event per month.
- n. Also of assistance in calculating the amount of unauthorized interception is the fact that Comcast did a detailed analysis of its legitimate, paying subscribers in a similar New England franchise as to their pay-per-view purchasing in the month of February, 2003. This analysis showed that a statistically significant number (.17%) of its legitimate, paying, high-end purchasers purchased fourteen (14) or more pay-per-view movies during that particular month.
- o. If legitimate, high end, paying subscribers of Comcast purchase fourteen or more pay-per-view movies in a given month it can be inferred that that individuals like the Defendant, utilizing a descrambler without any concern for costs, would also view at least as many pay-per-view movies as the legitimate high end paying subscribers of Comcast.
- p. It can also be inferred that that individuals like the Defendant, utilizing a descrambler without any concern for costs, would make a significant number of purchases of the more expensive adult offerings in addition to or in lieu of the lesser expensive pay-per-view movies.
- q. Applying the fourteen pay-per-view movies per month for the prices pertaining to the timeframe involved as to this Defendant and only assuming purchasing pay-per-view

movies (as opposed to the more expensive adult pay-per-view offerings) we can infer a reasonable value to the unauthorized interception of pay-per-view movies of \$55.30 per month.

- r. Taking into account the fact that the Defendant was also receiving \$68.00 in premium channels through the use of the descrambling device and inferring that he was obtaining at least \$55.30 per month of pay-per-view signals (based upon the high end purchasing statistical analysis referenced above) it is easy to infer that the Defendant was obtaining at least \$123.30 in unauthorized interception per month over the above referenced 15 month period of time; for a estimated total of \$1,849.50.

In the case of *Comcast v Naranjo* 303 F. Supp. 2d 43 (D. Mass 2004) the Massachusetts Federal District Court estimated damages from the use of the modified converter/descrambler by making reasonable inferences of the amount of use of the device by the Defendant in that case. The Court in the *Naranjo* case found there where an individual had access to a similar descrambling device it was reasonable to infer some unauthorized interception based upon the use of the device. The *Naranjo* court found that it was that it was reasonable to infer that the monthly damages included:

- a. The cost of the premium channels the defendant had unauthorized access to each month (this is the differential between what a defendant pays for service and the cost of all of the premium channels that they are able to obtain with the descrambling device);
- b. Ten (10) pay-per-view movies each month;
- c. Four (4) of the more expensive pay-per-view offerings.

Applying these numbers to the cost of the services during the pertinent time frame as set forth in the Affidavit of the Plaintiff an estimate of monthly damages based upon reasonable inferences of use would be:

The value of the premium channels received over and above what the defendant was paying for basic services	\$65.00
The value of ten pay-per-view movies,	\$39.50
The value of four more expensive pay-per-view events,	<u>\$32.00</u>
Total damage per month	\$136.50

B. Estimate of Actual Damages per month utilizing *high-end purchaser analysis*

By Affidavit, the Plaintiff has asserted that Comcast did an analysis of its legitimate, paying, legal subscribers in the region as to their pay-per-view purchasing in the month of February, 2003. This analysis showed that a statistically significant number (.17%) of its legitimate, paying, high-end purchasers purchased fourteen (14) or more pay-per-view movies during that particular month. Based upon these statistics the plaintiff asserts that if its high-end, legitimate, *paying*, legal customers purchase as many as fourteen or more paper views per month, it is clearly reasonable to infer that an individual like the Defendant who, when utilizing a descrambler (and not paying anything for pay-per-view offerings) would obtain at least as many pay-per-view movies per month as Comcast's legitimate high-end purchasers.

The cost of fourteen pay-per-view movies at the time in question was \$55.30. Adding this amount to the cost of the premium channels made available through the use of the descrambler (\$65.00) there would be a reasonable estimate of monthly damages of at least \$120.30. Indeed, the monthly figure for this Defendant should be considerably higher because, while the Plaintiff's analysis dealt with pay-per-view movies, the descrambling device would

also allow the Defendant access to the more expensive pay-per-view offerings (e.g. adult offerings or sporting events). It is reasonable to infer that at least some monthly viewing by the Defendant would be of more expensive pay-per-view offerings.

C. Estimate of number of months of unauthorized interception.

The court in the *Naranjo* case found that the estimated duration of the unauthorized interception began at the time when the defendant came into possession of the subject device *and* last ordered a premium channel or pay-per-view advert and concluded as of the date the device was returned to the plaintiff. In this civil action this Defendant never ordered a premium channel or pay-per-view while this particular converter descrambler was in her possession. From this information we can infer that the box was modified soon after it came into possession of the Defendant in August, 1999 and it was utilized until it was returned in December, 2000. This represents approximately 15 months of unauthorized interception.

4. Assessing additional damages, over and above an estimate of actual damages, pursuant to the exemplary damages provision of the statute, 47 U.S.C. § 553(c)(3)(B), based upon the willfulness and private financial gain of the defendant.

In the recent cases of *Charter v Cintron* (and related cases) 04-40064 FDS (D. Mass 2005) the Central Division of this Court found it could assess additional damages pursuant to 47 U.S.C. § 553(c)(3)(B) if it found the violations of 47 U.S.C. § 553(a) were willful and were for a private financial gain. *Id* at 20. The court went on to find that based on facts in that case it was indeed willful to purchase a descrambler and install it. *Id* at 22. In this case the Plaintiff alleges that the Defendant utilized a descrambling device by intentionally modifying one of its own

devices to create a homemade descrambling device. The Plaintiff asserts that this is indeed even more willful and malicious than utilizing an aftermarket descrambling device.

The court in the *Charter* case also found that “An individual's use of a descrambler to obtain cable programming without paying for it constitutes ‘private financial gain’ within the meaning of the statute, absent usual circumstances not apparently present here.” *Id* at 25. The *Charter* court stated that this reasoning was also followed in the case of *Cablevision v Lokshin*, 980 F. Supp. 107 (E.D.N.Y. 1997). The Plaintiff in this Action asserts that this Defendant was also making a private financial gain by utilizing the homemade descrambling device and he should be assessed additional damages.

5. Assessing Additional Damages as a form of Deterrence.

At least three separate cases where courts have *specifically added statutory damages for the purpose of deterrence*. See *Time Warner v Domsy*, No. 96 Civ. 6851, 1997 U.S. Dist. LEXIS 13505 (S.D.N.Y. Sept. 2, 1997), *DIRECTV v Getchel* 2004 WL 1202717 (D. Conn. 2004) and *Cablevision v Collins* 2004 WL 1490307 (S.D.N.Y. 2004).

The court in the *Domsy* case clearly set forth the deterrence reasoning when, after estimating the damage in a manner similar to *Naranjo* it said:

While I find these amounts reasonably approximate the lost revenue from the use of a pirate box, it would not be sufficient deterrence if the damages payable by a violator were limited to the value of the stolen services. There would be no incentive to cease the violation if the penalty were merely the amount that should have been paid. *Id* at 18

The *Domsy* court then went on to double its estimate of damages as a form of deterrence when assessing the statutory damages. This reasoning was recently explicitly followed in the *Collins* case where that court also doubled its estimate of damages as a form of deterrence when assessing statutory damages.

The Connecticut Federal District Court recently considered willfulness and deterrence when assessing statutory damages for the unauthorized interception of television signals in the case of *DIRECTV v Getchel*, 2004 WL 1202717 (D. Conn. 2004). The court in the *Getchel* case cited to the case of *Cable/Home Communications corp. v. Network Productions, Inc.*, 902 F. 2d 829, 852 (11th cir. 1990) for the proposition that "In its broad discretion for determining statutory damages, the district court should consider both the willfulness of the defendant's conduct and the deterrent value of the sanction imposed." *Id* at 3. The court then went on to assess statutory damages above the statutory minimum finding that the minimum would "have no deterrent effect" . *Id* at 3.

In this civil action, the Defendant has defaulted to the specific allegations that the violations were made in a willful and knowing manner. The converter/descrambler was not modified to obtain unauthorized signals by accident. Following the line of reasoning set forth in these cases, this court should double its estimate of actual damages or, at a minimum, the court should make an assessment of damage significant enough to act as a deterrent and to take into account the willfulness of the violation.

6. Conclusion as to Statutory Damages

Based upon the statute, the arguments and the case law referenced above, statutory damages in this case could be assessed even higher than the \$5,000.00 that is being sought by the Plaintiff.

III. Injunctive Relief

Based upon the Defendant's liability as determined by the Default, the Plaintiff is entitled to injunctive relief against the Defendant pursuant to Title 47 U.S.C. § 553 (c) (2)(A) which provides that the Court:

“may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a)(1) of this section”

The Plaintiff need not prove irreparable harm for the injunction to issue. Where express authority for issuance of statutory injunctions is provided by legislative enactment, an injunction may issue without resort to the traditional “equitable” prerequisites so long as liability has been established under the statute. See *General Instrument Corp. v. Nu-Tek Electronics & Manufacturing, Inc.*, 3F. Supp 2d 602, 607 (E.D.Pa.1998), aff’d 197F.3d 83 (3d Cir.1999). The terms of the requested injunction are reasonably drafted to thwart any future piracy activities by the Defendant.

IV. Attorney's Fees

Pursuant to Title 47 U.S.C. 553(c)(2)(C), the Court should direct the recovery of full costs, including awarding reasonable attorneys fees to an aggrieved party who prevails. The First Circuit follows the "lodestar" approach when awarding attorney's fees pursuant to a Federal statutory authorization. See, *Furtado v. Bishop*, 635 F.2d 915, (1st Cir. 1980). Using the "lodestar" approach, the Court would normally multiply the number of hours worked by a reasonable hourly rate. Utilizing the "lodestar" approach, the Court would, in essence, multiply the reasonable number of hours worked by a reasonable hourly rate. Plaintiff's counsel has filed an Affidavit with this court that would justify an attorney's fees award of \$2,168.00.

V. Post-judgment Interest

The Plaintiff is entitled to post-judgment interest accruing on the Judgment pursuant to 28 U.S.C. §1961. Said statute covers post-judgment interest on civil actions brought to judgment in U.S. District Courts.

VI. Costs

The Plaintiff is also entitled to costs incurred in this action pursuant to § 553, specifically:

- | | | |
|----|------------------------|-----------------|
| a. | Filing Fee: | \$150.00 |
| b. | Sheriff's Service Fee: | <u>\$ 60.70</u> |

TOTAL COSTS:	\$210.70
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VII. Conclusion

Pursuant to all of the above, the Plaintiff is entitled to a default judgment as follows:

1. \$5,000.00 in statutory damages pursuant to § 553;
2. Attorney's and paralegal's fees of \$2,168.00
3. Costs of **\$210.70**
4. The issuance of a permanent injunction pursuant to Title 47 §553 utilizing the following language or language of a similar nature:

The Court hereby enjoins the Defendant, the Defendant's respective agents, servants, employees, and any person or entity controlled directly or indirectly by the Defendant or acting on the Defendant's behalf from the further modification and/or use of electronic equipment designed for the unauthorized interception of signal in violations of provisions of Title 47;

5. Post-judgment interest running on the judgment pursuant to 26 U.S.C. § 1961.

Respectfully Submitted for the Plaintiff,
Comcast of Southern New England, Inc.
By Its Attorney,

5/2/05
Date

/s/ John M. McLaughlin

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